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No. 5 ORIGINAL. No. 1 Orig

O. T. 1907

In the Supreme Court of the United States,

OCTOBER TERM, 1905

The State of Georgia, by its Attorney General, John C. Hart, Plaintiff,

vs.

The Tennessee Copper Co. and the Ducktown Sulphur, Copper and Iron Co., Limited, Defendants.

IN EQUITY.

Reply Brief and Argument in Behalf of the Ducktown Sulphur, Copper and Iron Company, Limited, on Rule to Show Cause, Etc.

JAS. G. PARKS, Attorney,
Cleveland, Tenn.

GAUT-OGDEN CO., KNOXVILLE, TENN.

No. 13 ORIGINAL.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,
Defendants.

IN EQUITY

STATEMENT.

With leave of the Court this defendant, (which, for the sake of brevity, will hereinafter be referred to as the Ducktown company), begs respectfully to submit that the prayer of the complainant's bill, as to the temporary restraining order sought, seems to be of somewhat doubtful meaning in one particular. In the second paragraph thereof it is prayed that an injunction be granted against the defendants to restrain them from operating their furnaces, etc., "until such time as your Honors shall direct herein; and that upon the hearing hereof the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon said injunction be made perpetual."

This would seem to imply that a temporary injunction is asked against both defendants, but the next paragraph

further prays that, pending the hearing of this cause, a temporary injunction be granted against the defendant Tennessee Copper Company to restrain it from blowing in and operating its four new furnaces. Unless this be taken in the alternative of the above-mentioned prayer, it would seem to imply that a temporary injunction is asked against the Tennessee Copper Company alone.

At the beginning of the argument of complainant's counsel in support of the motion for leave to file and for a temporary injunction, it is stated that the complainant seeks to file its bill against the defendants, (naming them), "to restrain the operation of their works at and near Ducktown, Tennessee, and for a temporary injunction against the Tennessee Copper Company, during the pendency of this suit, from beginning the operation of four new furnaces now in course of completion." Again, at the conclusion of said argument, it is urged "that without the restraining order directed to the Tennessee Copper Company, as prayed, Georgia, her citizens and her territory will be irreparably damaged."

Being in some doubt as to the scope the application was intended to cover, the defendant's counsel, before learning of the order of the Court, addressed an inquiry to the complainant's counsel, who replied in substance that he thought it fair to state that he had not expected that on the preliminary hearing an injunction would be granted against both companies, but only a temporary restraining order against the blowing in of the four additional furnaces mentioned.

A copy of said reply is hereto appended as exhibit A, the original being filed in the clerk's office.

While it is fully understood that this is in no way

binding upon this Honorable Court as to any order it may deem proper to make, it is thought not to be improper to direct attention to the fact that it was not the purpose of the complainant to ask for a temporary restraining order against the Ducktown company.

ANSWER OF THE DUCKTOWN COMPANY.

This defendant has answered in discharge of the rule to show cause, filing affidavits which clearly show that whatever of injury may have been done in Georgia by the sulphur fumes, no appreciable part of it has resulted from those coming from its works. And in this connection it is worthy of note that in the report of the commission, appointed by the Governor of Georgia in 1905 to make examination into conditions at and near Ducktown, and upon whose recommendation the bill was filed, no complaint is made of this defendant, its name not even being mentioned. It is true that in a former suit filed in 1903 it was made a party defendant, but that was after some four or five residents of Georgia had filed complaints on account of alleged injury from the fumes coming from its open-heap roast-plant, which was located about two miles from the state line. After said complaints were filed the Ducktown company, in 1902, abandoned its open-heap roasting operations, which had been carried on at the same place about nine years. It has since been carrying on its entire reduction operations at its smelting-works, which are three miles or further from the Georgia line; and since then no complaint or suit of any kind has been filed by any resident or land-owner of Georgia on account of alleged injury from the fumes coming from said smelting-

works, nor has any claim for such injury been presented for settlement out of court.

BRIEF HISTORY OF OPERATIONS.

Copper was first discovered at Ducktown in 1849. The region was then practically an uninhabited wilderness. It is said that the total state and county revenue derived from all realty, personalty and polls in the district amounted only to seven dollars and fifty cents. Within the next two years after discovery numerous mines were opened. Population flowed in, and within a short time Polk county stood third in the list of the highest tax-paying counties in the state. Active operations were carried on until about 1879, when the companies were forced to suspend. This was largely due to the want of railway connection, the nearest line then being forty miles distant; to the increasing cost of fuel, because of the constantly increasing distances the wood and charcoal had to be hauled on wagons; to the fact that the richer ores had been exhausted; and to the falling price of copper, due to the opening of the rich mines of the West. A long period of idleness followed. The greater part of the people, who had been dependent upon the working of the mines, were forced to move away, until in 1890 the population of the place had dwindled to about two hundred. The general expert opinion was that the ores, though practically inexhaustible in quantity, were of too low grade to be profitably worked, especially as no way had ever been found for utilizing their sulphur and iron contents. In fact, no way had ever been found by which the ores could be successfully smelted without first expelling the greater part of their sulphur by open-heap roasting. This, it may be ex-

plained, is done by placing a layer of cord-wood about eighteen inches deep on a level space or hearth about thirty by sixty feet square. About two hundred tons of ore is placed on this. The cord-wood is set on fire and this, in turn, ignites the sulphur, the smoke or fumes therefrom being thrown off into the air. As it takes four or five months for a heap to roast, several hundred heaps are required to be kept burning in order to supply a smelting-plant.

During the entire history of copper smelting until recently, this was the only known method by which ores of this class could be successfully treated. It had been found commercially impossible to roast them in stalls, kilns, shelf-burners, calciners, or in any other way than that mentioned; and without roasting, it had been found impossible to smelt them. Notwithstanding this, when the Ducktown company came into the field in 1891 it spent the better part of two years and about $200,000 in making all manner of tests and experiments, hoping to find some way whereby the great waste involved in the old method might be saved. All methods known to metallurgy were tried. The ores being mono-sulphides and being peculiarly refractory, all of said tests failed. They were made under the immediate supervision of Dr. Ricketts, an eminent metallurgist of New York, and it was finally upon his advice that the company fell back to the old method as the only possible one by which the ores could be successfully treated.

See affidavits of Pierre de P. Ricketts, p. 13 of answer and exhibits; W. H. Freeland, p. 18.

In 1893 the company erected its open-heap roast-plant at a place locally known as Cartertown, about two

miles from the Georgia line. Its smelting-plant was, and is yet, located at Isabella, three miles or further from said line. It carried on its roasting operations continuously at Cartertown for a period of about nine years, or until August, 1902.

See affidavits of J. M. Center, p. 28; W. H. Freeland, p. 20; D. M. Stuart, p. 33; B. P. Rollins, p. 42 of answer and exhibits.

In 1902 the general manager of the Ducktown company perfected a process by which the ores can be smelted without previous roasting. Upon the discovery of this process the company abandoned open-heap roasting and has since carried on all its reduction operations at its Isabella smelting-plant, three miles or further from the Georgia line.

As already stated, prior to the time the company ceased open-heap roasting five persons owning land in Georgia had filed complaints on account of alleged injury from the fumes arising therefrom. The lands of four lay just beyond the state line, while those of the fifth lay partly in both states. They were the nearest lands in Georgia to the works of this defendant. Three of the best citizens of the county made careful inquiry into the grounds of complaint and a thorough examination of the lands, but found no injury whatever. This was in May, 1901, about the time the Tennessee Copper Company began open-heap roasting upon a much larger scale than this defendant. Since this defendant abandoned open-heap roasting in 1902 no complaint has been filed against it by any citizen of Georgia.

See affidavits of M. T. Fouts, pp. 35-36; B. P. Rollins, pp. 40-41; G. C. Parks, pp. 46-47; W. H. Freeland, pp. 20-21 of answer and exhibits.

Another credible witness says that he paid special attention to the lands of these parties about this time, because he had heard that they had made complaint. He says there was no injury; that it was about a mile from their lands towards the mines that any evidences of injury were noticeable at all, and that it was nearly a mile still further before they were plain to be seen.

Affidavit of J. M. Center, pp. 29-30 of answer and exhibits.

Another witness says that he owns land about three miles from the defendant's present smelting works, but which is much nearer the site of the old roast-plant; that while roasting was being done at said plant some injury was done to vegetation on his land, but that since the operations have been carried on altogether at said smelting works no injury whatever has resulted.

Affidavit of D. M. Stuart, p. 33 of answer and exhibits.

The lands in Georgia contiguous to the inter-state line are all much nearer the works of the Tennessee Copper Company than those of the Ducktown company. While those of the five above-mentioned persons are the nearest in that state to the works of the latter, they are still nearer those of the Tennessee Copper Company, being less than two miles away. If they are being injured, it might not be easy to show by direct proof that the fumes from the works of both defendants do not contribute, but it is circumstantially shown with reasonable certainty that, if being injured at all, it is not by fumes from the plant of this defendant.

NO INJURY FROM THIS DEFENDANT'S OPERATIONS.

From what has been shown above it is clear that at the time the Tennessee Copper Company commenced roasting operations in 1901 no appreciable injury had resulted to said lands from the operations of the Ducktown company, although they had been carried on about eight years at the same place. And it is reasonable to assume that, being the nearest, said lands would have been injured, if any were. Now, that for over three years past the operations have been carried on at a point fifty per cent. further away than before, without suit or complaint on the part of any citizen of said state, it is a fair presumption that no injury is being done by its present operations. Moreover, it is shown by the party above-mentioned, whose lands lie in another direction, but about the same distance away from the defendant's plant as do the nearest lands in Georgia and which are also beyond reach of the fumes from the Tennessee Copper Company's works, that no injury has resulted to his timber, crops, etc., since this defendant ceased open-heap roasting. As stated, if his lands were being injured by either company, it would not be easy to show that both do not contribute; but he shows that, being about the same distance from the works of the Ducktown company as the nearest lands in that state, and also beyond the reach of the fumes from the works of the other company, his lands are not now being injured at all. From these facts and circumstances we respectfully insist that the charge that the fumes from the works of this company are working injury in Georgia is not well-founded in point of fact; or, if there be

injury, that it certainly cannot be of such magnitude as to injure the State of Georgie in its sovereign capacity, even if should be granted that this is possible under the facts of a case like this.

NO NEW APPLIANCES.

The charge in the bill that in adopting said new process of smelting new or different appliances than those formerly in use were installed and tall stacks or chimneys built, whereby, it is alleged, the fumes are increased and made stronger and more noxious than before, and thrown off at a greater elevation and thereby spread and diffused over a wider area, has no application to this defendant.

It has installed no new appliances, nor erected any tall chimneys or stacks, but is simply smelting the green ores in the same furnaces heretofore used for smelting the roasted ores. The furnace stacks are the same as were then used, being ordinary tubular iron stacks about sixty feet high. Moreover, its smelting plant is located in a hollow or ravine below the mean level of the region, and below the site of its old roast-plant, so that the fumes therefrom are not thrown off at a greater elevation than those that came from said roast-plant. Hence, whatever there may be in the charge that the fumes thrown off at a high altitude are carried by the air-currents over a wider area and do more harm, it has no application to this defendant.

See affidavit of W. H. Freeland, pp. 21-22 of answer and exhibits.

FUMES NOT INJURIOUS TO HEALTH, ETC.

As to the general charge that the fumes arising from the operations of both companies are injurious to health;

it is shown by a number of witnesses, who have worked in them at the roast piles where they are strongest, that they are not only not so, but are regarded as beneficial in many morbid conditions, notably those of the air-passages. It is a matter of common knowledge that sulphur fumes are an excellent germicide, preventing the spread of communicable diseases. In fact, eminent medical men now recognize the inhalation of sulphurous acid gas, the active principle of these fumes, as an excellent treatment for tuberculosis.

The charge that the fumes shut out the sunlight and darken the atmosphere is shown to be as true of smoke coming from any ordinary manufacturing plant of like proportions. It is shown that the mining region is subject to fogs, and that on an average of once a month, perhaps, they settle over the district. Whatever fumes may be in the air settle with them, but after sunrise they lift and are dissipated. It is shown that the so-called smoke has, in fact, more the appearance of fog than anything it can be likened to. It is further shown that, aside from the question of injury to vegetation, the smoke conditions of many cities are worse than those of Ducktown.

See affidavits of W. H. Freeland, pp. 24-25; J. M. Center, p. 30; G. C. Parks, p. 49 of answer and exhibits.

It is also shown that the affected area in Georgia is limited to a small belt adjacent to the mines, and the injury here has been over-estimated. As already stated, the greater part of the timber for several miles around has been cut away for use in roasting operations, thus giving the country a somewhat barren appearance; but here, except immediately around the works, the wild grasses grow in much greater abundance than further

away in the timber. It is also shown that within less than a mile of the Tennessee Copper Company's plant as good crops have been grown during the past several years as ever grew on the same land. It is true that some forms of tender vegetation are killed a considerable distance from the works, and the timber, if it had not been cut away, would have been killed for some distance; but the wide-spread devastation charged is not shown by the proof.

CHARACTER OF MINING REGION.

It is further shown that the copper district is in a remote, mountainous region where the soil is thin, rocky and naturally sterile. It is not adapted to farming, there being but five or six farms in the whole district that are capable of yielding their owners even a meagre living. The timber under the former period of operations was cut away for miles in every direction. The young growth that sprung up during the period of suspension of operations from 1879 to 1891 has nearly all been cut away for use in recent roasting operations, thus giving the region a somewhat barren appearance so far as timber is concerned. Hence the timber interests there amount to little or nothing. It is shown that the mining interests are paramount to all others combined, including the territory, perhaps, for twenty or twenty-five miles around. The mining companies pay taxes upon a greater assessment than did the entire county before the resumption of operations. In 1890 the town had a population of barely two hundred, while now it is conservatively estimated at from eight to ten thousand people, practically all of whom are directly dependent upon the working of the mines. Counting those living

in the adjacent territory, who are indirectly dependent thereon, the population would probably amount to twelve thousand.

See affidavits of W. H. Freeland, p. 26; M. T. Fouts, p. 36; B. P. Rollins, pp. 42-43.

It is also shown that said region is as well if not better suited by nature for the operations there being carried on than any other in that part of the country; and that even if there were a more suitable locality, the ores are of such low grade as to make it commercially impossible to ship them elsewhere for treatment. In short, it is clear that the region is being put to the use evidently intended by nature.

See affidavits of Dr. Pierre de P. Ricketts, p. 13; W. H. Freeland, pp. 25-26.

RESTRAINING ORDER NOT JUSTIFIED BY FACTS.

We respectfuly submit that these facts do not warrant the granting of a temporary restraining order against either or both of the defendants. The Ducktown company has been at work in the district nearly fifteen years. For over twelve of these it has been carrying on active reduction operations. For a period of about nine years its fumes were generated much nearer the territory of Georgia than for the past three years, and no appreciable injury resulted even to the nearest lands in that state. It is a reasonable inference that no injury is being done by its present works, which are fifty per cent. further away, especially when it is shown that lands somewhat nearer, which were slightly injured by the old operations, are not now being hurt at all.

The theory advanced that the fumes coming from the present method are stronger and more hurtful than those from the old is not believed to be sound. It is true that at the point of exit from the furnace stacks they are more concentrated, but it is plain that they will soon become scattered over a much greater area than is covered by an ordinary roast-plant. Under the old method practically all the sulphur in the ores was expelled in roasting and smelting just as it is now in smelting alone. What may have remained in the ores after roasting must have been expelled in smelting. The only difference is that it was thrown off at another place, but all in the same immediate neighborhood.

So the argument that if so much gas will prove injurious to vegetation over a square mile, therefore, ten times the quantity coming from the furnace stacks will cause ten times the amount of injury is not sound. The reasoning would be correct, provided the gas were evenly distributed, giving each square mile its due proportion and scattering that evenly over each mile; but nature does not distribute it that way. Experience shows that by far the greater part of it settles to the earth comparatively near the works, while but a small proportion ever reaches beyond a few miles.

It is shown by the most eminent authority that no way has ever yet been found for treating these ores without liberating the sulphur fumes. It is easy to imagine that because other ores of a different chemical combination may be so treated as to utilize the sulphur that these can be treated in the same way. But it is shown that it has never been found possible. And it must be plain that the companies would not allow hundreds of dollars worth of sulphur to be wasted every day, if it were pos-

sible to save it. It follows that to prohibit the use of present methods would be equivalent to closing the mines.

THE LAW OF THE CASE.

We deem it wholly unnecessary in behalf of this defendant to discuss at length the law applicable to this case. We may say, however, that the well-known rule that courts of equity in granting or refusing injunctions will always look to the facts of each particular case as it arises applies with peculiar force to cases of nuisance, especially where the alleged nuisance is a business or enterprise being carried on in a lawful manner. Much of the apparent conflict in the numerous decisions on this subject is due to the fact that courts have often undertaken to apply principles that govern one case to the facts of another wholly dissimilar. As has been well said by Judge Cooley, in his work on Torts, a definition of a nuisance is seldom attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing.

A distinction which is often overlooked is that between enterprises, which have no relation to the place where they are situated, and which may be carried on as well at one place as another, and those whose location at a particular place is made necessary by the character of the earth and its mineral contents. To the first class belong such well-known nuisances as slaughter-houses, tanneries, varnish-plants, fertilizer-works and like noxious and obnoxious enterprises. As a rule, a court of equity will restrain such at the suit of an injured adjoining proprietor, because their location at a particular place in no way connected with the natural use of the

land where they are situated. To the other class belong such enterprises as fire-brick works, coke-ovens, coal-breakers, coal and iron-ore washers, and the like, where the nature of the business is such as to make it necessary that it be carried on at the place where the raw material is taken from the earth.

There are many cases belonging to the latter class where injunctive relief has been denied, and some, in which the business was of quasi-public character, where even the legal right to compensation has been questioned. If one person owns a tract of land valuable only for mining purposes, and there is no way by which the minerals can be utilized without doing some injury to the use of the adjoining property as a farm or dwelling place, where is the superior legal right? Can the adjoining proprietor insist upon a legal right to use his property in such manner as will prevent the use of the other in the only available way? Or will the natural character of the two places determine the respective rights of the proprietors in their use? It seems clear that each has the right to put his property to the highest and best use intended by nature, and if these uses conflict, neither can claim a higher or superior right and enjoin the other, but must accept compensation for such injury as flows from a natural use of the adjoining lands.

Robb vs. Carnegie, 145 Pa. St., 324, was an action to recover damages caused to the plaintiff's crops and to the comforts of his home by the smoke and fumes coming from the coke-ovens of the defendant. The recovery was resisted on three grounds:

(1) It was insisted that such injuries were the natural and necessary result of the development by the

owner of the resources of his land, as in Penn. Coal Co. vs. Sanderson, 113 Pa. St., 126. This defense was thus answered by the court:

> "In Sanderson's case the land of the company was coal land. Its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal land denied the exercise of the rights of ownership in his land for the benefit of a neighboring owner, whose title was no greater or higher than his own. The maxim, *sic utere tuo ut alienum non laedas*, was, therefore, neither suspended nor modified in Sanderson's case. The coal company was using its own land in the only manner practicable to it. The harm done thereby was the least in amount consistent with the natural and lawful use of his own. If this use was to be denied to the coal company, because some injury or inconvenience to others was unavoidable, then the result would be a practical confiscation of the coal lands for the benefit of householders living on lower ground. But the defendants are not developing the minerals in their land, or cultivating its surface. They have erected coke-ovens upon it, and are engaged in the manufacture of coke. Their selection of this site, rather than some other, is due to its location and to their convenience, and has no relation to the character of the soil, or to the presence or absence of underlying minerals. The

selection was no doubt a wise one, quite secluded and quite convenient to the several mines from which the material was to be obtained for the making of the coke; but it was the selection of a manufacturing site, and is subject to the same considerations as though glass, lumber, or iron had been the commodity to be produced, instead of coke. The rule in Sanderson's case has therefore no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or subjacent strata."

(2.) It was claimed that the injuries resulted from a reasonable use by the defendant of his own land for a lawful purpose, as in Huckenstine's Appeal, 70 Pa. St., 102. But to this the court replied:

"The rule in Huckenstine's Appeal is equally inapplicable. The land of appellant in that case had upon it a deposit of fire-brick clay, which could be made into bricks with profit, if this was done near the pit from which the clay was taken. * * * * An effort was made to enjoin against the burning of the bricks. * * * * The injunction was refused, and it was held that, upon the case as presented, Huckenstine was making a reasonable use of his own land, which equity would not interfere with. Whether he would have been liable in an action at law for any substantial injury he might do in burning the bricks was not before the court and was not considered.

We think it is true, as held by the judge of the

> court below, that the evidence in this case would not justify an injunction. It shows the selection of a site as well adapted to the business, and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture, and the destruction of vast allied and independent industries of immense value to the public, as well as those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a court of equity when it will inflict greater injury than it will prevent. In such a case the injured party will be left to his redress at law.

(3.) Lastly, it was claimed that the injuries resulted from a lawful calling, conducted in a lawful manner, and that no compensation could be claimed for injuries caused thereby, as held in Penn. Ry. Co. vs. Lippincott, 116 Pa., 472; but the answer of the court was that, so far as railroad and turnpike companies and municipal corporations were concerned, they operated their railroads, highways and streets for the benefit of the public, and that individuals could have no right of action for damages caused by noise, smoke, etc., incident to their operation.

We quote at length from this case, because it clearly illustrates the principle that a person has equal right with an adjoining proprietor to put his land to the highest and best use to which it is adapted by nature, being responsible in damages only for such injuries as may flow therefrom to the adjoining proprietor in the natural and lawful use of his land.

In Clifton Iron Co. vs. Dye, 87 Ala., 471, the court said:

> "The court will take notice of the fact that in the development of the mineral interests of this state, recently made, very large sums of money have been invested. The utilization of these ores, which must be washed before using, necessitates, in some measure, the placing of sediment where it may flow into streams which constitute the natural drainage of the section where the ore-banks are situated. This must cause a deposit of sediment on the lands below; and while this invasion of the rights of the lower riparian owner may produce injury, entitling him to redress, the great public interests and benefits to flow from the convertion of these ores into pig metal should not be lost sight of."

In the above, as well as in many other well considered cases, it is held that the court, in passing upon the question of injunctive relief, should have regard, not only to the strict rights of the plaintiff and defendant, but also to all the surrounding circumstances, including the interests of the public. In that case the court said: "In determining this question, the court should weigh the injury that may accrue to the one or the other party, and also the public, by granting or refusing the injunction." Citing, Wood vs. Sutcliffe, 2 Sim. N. S., 162; E. & W. R. R. vs. E. T. V. & G. R. R., 75 Ala., 295; C. & W. R. R. Co. vs. Witherow, 82 Ala., 190; 1 High on Injunc., sec. 498; Davis vs. Sowell, 77 Ala., 262; Torrey vs. Camden R. R. Co., 18 N. J. Eq., 293; McBryde vs. Sayre, 86 Ala., 458.

In Richard's Appeal, 57 Pa., St., 105, the court said:

> "It is elementary law that a decree in equity is never of right, as a judgment at law is, but of grace. Hence, the chancellor will consider whether he will do greater injury by enjoining

than would result from refusing and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear, he will refuse to enjoin. Hilton vs. Earl of Granville, 1 Crag & Ph. Ch. R., 292.

In the case of McGhee vs. Tennessee Copper Co. et al., 83 Southwestern, 659, 113 Tenn., 338, cited by complainant's counsel, the following appears:

> "The following facts are also found: That the total tax aggregate of Polk county for the year 1902 was $2,585,931.43, of which total the assessment of the defendants amount to $1,279,533.00. It is also found that prior to the operations of these companies there lived in the district where the works are located only two hundred people, whereas there are now living in this district, almost wholly dependent upon these copper industries, about 12,000 people.
>
> It was also found that one of the defendants, the Tennessee Copper Company, employs on its pay-roll 1,300 men, and that the average pay-roll is about $40,000.00 per month, nearly all of which employes have been drawn from the population of Polk and neighboring counties.
>
> It is further shown that one of the defendants, the Tennessee Copper Company, consumes, approximately, 3,000 tons of coke, 2,800 tons of coal, and 1,000 cords of wood per month, and that it purchases and uses 2,100 car loads of coal, coke, wood, etc., per annum. In the year 1901 it purchased and used approximately 1,100 car loads of cord-wood, cross-ties, lumber and quartz. It was also found that eighty per cent. of these supplies were purchased from and delivered by the citizens of Polk county. The aggregate paid out for supplies is not stated by Court of Chancery Appeals, and cannot be here

stated accurately; but certainly the amount is very large. And it is seen from the figures that one of the defendants, the Tennessee Copper Company, pays out annually in wages in Polk county nearly a half million dollars. The Court of Chancery Appeals finds that the other company employs between 1,100 and 1,200 people, and from this it may be inferred that that company pays out for wages and supplies annually nearly as much as the Tennessee Copper Company.

It is quite apparent that the two companies pay out, annually, vast sums of money, which are necessarily of great benefit to the people of the county, and that they are conducting and maintaining an industry, upon which a laboring population of from 10,000 to 12,000 are practically dependent; and it is found in substance by the Court of Chancery Appeals that if these industries be suppressed, these thousands of people will have to wander forth to other localities to find shelter and work.

* * * * * * * * * * * *

In order to protect by injunction several small tracts of land, aggregating in value less than one thousand dollars, we are asked to destroy other property worth nearly two millions of dollars, and to wreck two great mining and manufacturing enterprises, which are engaged in work of very great importance, not only to their owners, but to the state and to the whole country, as well; to depopulate a large town and deprive thousands of working people of their homes and livelihood and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of the complainants, an appropriation without compensation. The defendants cannot reduce their ores

> in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all their rights. * * * *

The above is from the findings of the Court of Chancery Appeals, as set out in the opinion of the Supreme Court, as is the quotation in the argument of complainant's counsel, touching the injury to timber and crop interests, etc.

We respectfully differ from complainant's counsel in the statement that the Supreme Court of Tennessee "begged the question of injunction" and decided the above case under a Tennessee statute giving courts discretion in such cases. Prior to the passage of the statute mentioned, when a suit was brought in the circuit court for damages from a nuisance, upon the finding by a jury of the fact of a nuisance the court had the power, upon petition of the plaintiff, to abate the nuisance. The chancery courts, independently of statute, exercise the same discretion as courts of equity in other states in respect to granting or refusing injunctions in cases of nuisance. This statute in effect provides that the court may look to the public utility of the alleged nuisance, and, in the exercise of sound discretion, abate it or not abate it, as may be right. And the court, in its opinion, simply accepts it as declarative of legislative policy, and as reaffirming the discretion always exercised by the chancery courts.

We also fail to note where the court bases its decision upon the doctrine of prescriptive right. So far as we are able to see it is simply held that the complainants' suit as to one of the defendants was barred by laches.

After said operations have been carried on for a

period of twelve years without cessation or material change, except being further removed from the territory of Georgia, it would seem that the complainant's rights, whatever they may be, are not now so imperiled as that, in equity and good conscience, it should be heard to insist upon the granting of a restraining order at this juncture, and in advance of a full hearing on the merits, thereby throwing hundreds of people out of employment in the dead of winter, not to mention the irreparable loss the defendant itself would suffer.

Respectfully submitted,

JAMES G. PARKS,
Counsel.

EXHIBIT A.

Letter of Attorney General John C. Hart.

STATE OF GEORGIA,
ATTORNEY GENERAL'S OFFICE,
ATLANTA.

John C. Hart, Attorney General.

November 5th, 1905.

Judge Jas. G. Parks, Cleveland, Tenn.

Dear Sir—In reply to your letter of the 6th inst., relative to the injunction sought in the case of State of Georgia vs. Tennessee Copper Co. et al., now pending in the Supreme Court, and especially relative to the preliminary injunction asked for: I received several days since a copy of the process and order filed in this case, and Mr. Johnson, associate counsel, will this week serve you with a copy.

I think it is fair to state that I did not expect that the court would, at the hearing for a preliminary injunction, take up for consideration the grant of an injunction against both companies. That is to say, I did not expect the court to grant the injunction against the companies until the final hearing, but would temporarily restrain the blowing in of the additional furnaces. The order of the court throws no light as to the scope that the hearing is to take in December, but deals only in general terms, requiring the defendants to show cause why the injunction prayed for should not be granted. This may cover the entire case, and while I do not expect it, the court would be justified in doing so in the light of the pleadings. I think, at least, it would be safer to give it that direction. I, at least, would hesitate to suggest that the court meant any less than its order implies.

With kind regards, I beg to remain,

Yours very truly,

(Signed) JOHN C. HART,
Attorney General.

Orig. 1.

O. T. 1906

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 4 1905
JAMES H. McKENNEY,
Clerk.

No. 1 Or

No. 5 ORIGINAL. O. T. 190

In the Supreme Court of the United States,

OCTOBER TERM, 1905

The State of Georgia, by its Attorney General, John C. Hart, Plaintiff,

vs.

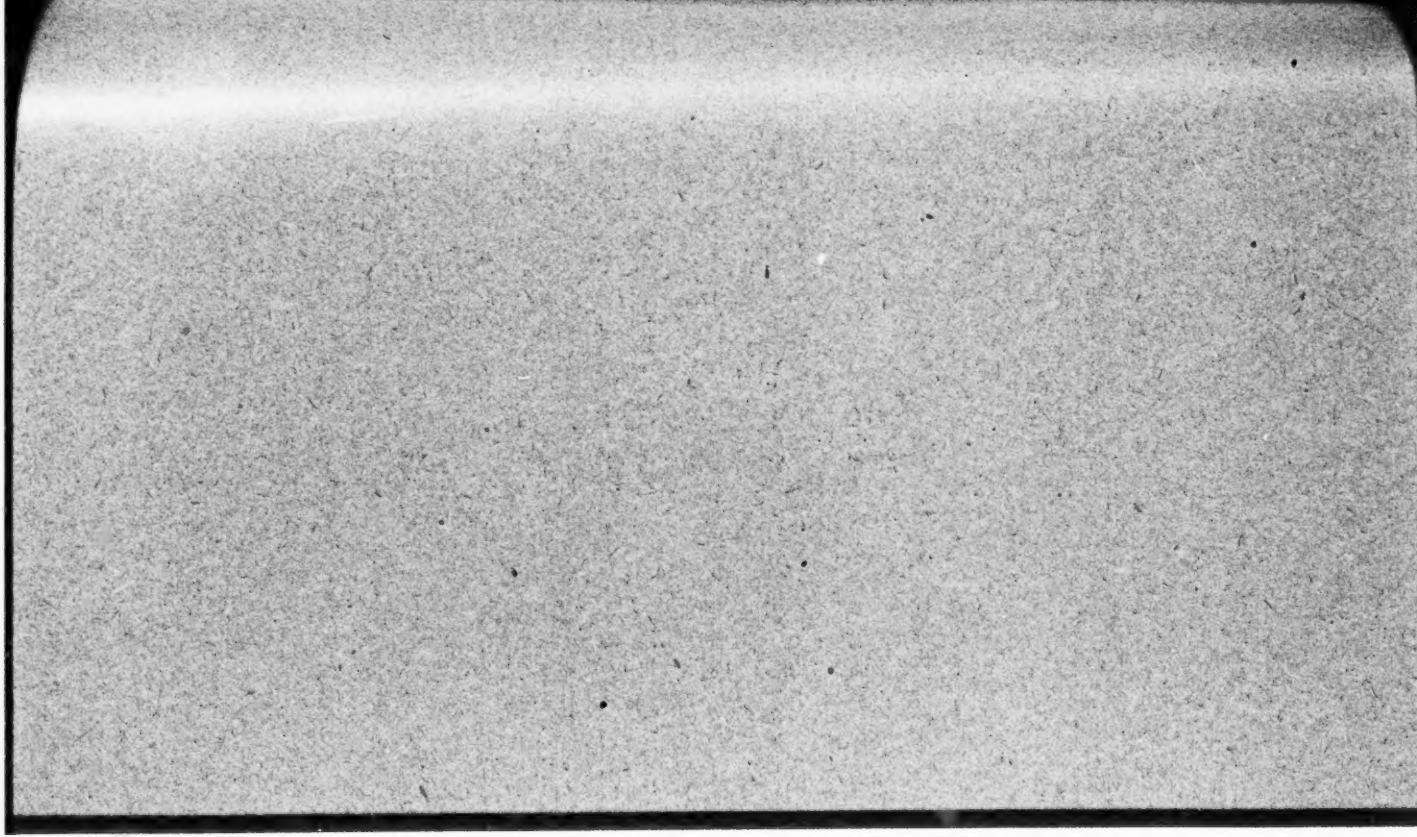
The Tennessee Copper Co. and the Ducktown Sulphur, Copper and Iron Co., Limited, Defendants.

IN EQUITY.

Demurrer of the Ducktown Sulphur, Copper & Iron Company, Limited, to the Original Bill.

JAS. U. PARKS, Attorney for the D. S. C. & I. Co,.
Cleveland, Tenn.

GAUT-OGDEN CO., KNOXVILLE, TENN.



No. 13 Original.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

STATE OF GEORGIA,
By its Attorney General, John C. Hart,
Plaintiff,

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, Limited,
Defendants.

In Equity

Demurrer of the Defendant, Ducktown Sulphur, Copper & Iron Company, Limited, to the Original Bill.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, says that they are not sufficient in law to entitle the plaintiff to maintain its said bill, and for cause hereof says:

First.

This Court has no jurisdiction of either the parties to or the subject-matter of this suit, because:

1. The facts stated in the bill show that no property or property rights of the State of Georgia are in any manner injured or affected by the matters alleged, and that this is not a controversy arising directly between said State

and the defendants, but, at most, is one in which said State has only a remote and contingent interest.

2. The facts stated in the bill show that this is not a controversy between the State of Georgia and the defendant; that said State is, in fact, simply lending its name to prosecute this suit for and in behalf of a few of its citizens, who reside in a designated integral portion of its territory, and that the State at large, in its corporate or sovereign capacity, has no direct interest herein.

Second.

The facts averred are not such as to entitle the plaintiff to the relief sought, it not appearing therefrom that the alleged injury to its said citizens is irreparable, and that a full, adequate and complete remedy may not be had at law.

Wherefore, on account of the insufficiency of said bill in point of law, this defendant prays judgment of the Court whether it shall be required to make further answer, and that it be hence dismissed with costs.

JAS. G. PARKS,

Attorney for the Ducktown Sulphur, Copper & Iron Company, Limited.

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

JAS. G. PARKS,
Attorney for the Defendant.

STATE OF TENNESSEE, }
BRADLEY COUNTY. }

James G. Parks makes solemn oath that he is agent

and attorney for the defendant Ducktown Sulphur, Copper & Iron Company, Limited, and that the foregoing demurrer is not interposed for delay.

JAS. G. PARKS.

Sworn to and subscribed before me,
this 29th day of November, 1905.

W. P. LANG,
Notary Public.

(SEAL)

Orig 1.

O. T. 1907

O. T. 1906

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 4 1906
Clerk

No. ORIGINAL.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

The State of Georgia, by its Attorney General, John C. Hart, Plaintiff,

vs.

The Tennessee Copper Co. and the Ducktown Sulphur, Copper and Iron Co., Limited, Defendants.

Brief and Argument of the Demurrer of the Ducktown Sulphur, Copper & Iron Company, Limited, to the Original Bill.

Jas. G. Payne, Attorney,
Cleveland, Tenn.

No. 13 ORIGINAL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

THE STATE OF GEORGIA,
BY ITS ATTORNEY GENERAL, JOHN C. HART,
Plaintiff.

vs.

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED.
Defendants.

IN EQUITY.

Brief of the Ducktown Sulphur, Copper and Iron Company, Limited, on its Demurrer to the Original Bill.

STATEMENT.

The bill of complaint in this cause is filed by the State of Georgia for the purpose of restraining the copper-smelting operations of the defendants, the smoke, gases and fumes from which are alleged to be injurious to the lands, timber, crops, etc., of the citizens of portions of certain counties of that state.

It is not alleged that any property belonging to the State of Georgia is being injured, but that by reason of the alleged injury to the property of its citizens, the taxable value of such property is lessened, and the public revenues of the State thereby diminished. It is also

alleged that by reason of injury to vegetation the soil is rendered barren, causing the rain-fall to run off much more rapidly than it otherwise would, thus injuring the public highways by causing ruts, holes and gullies to be washed in them. It is also averred that said fumes are unpleasant, noxious and unwholesome.

It will be seen that the theory upon which the complainant seeks to maintain its bill is, first, in its own right by reason of the alleged diminution of its public revenues, and the alleged injury to public highways; second, in the capacity of trustee for those of its citizens who claim to have been injured.

The defendant Ducktown Sulphur, Copper & Iron Company, Limited, has filed its separate demurrer to the bill, assigning the following grounds therefor:

First.

This Court has no jurisdiction of either the parties or subject-matter of this suit, because:

1. The bill shows that no property or property rights of the State of Georgia are in any manner affected by the matters alleged in the bill, and that this is not a controversy arising directly between said state and these defendants, but, at most, is one in which said state has only a remote and contingent interest.

2. The facts show that this is not a controversy arising directly between the State of Georgia and these defendants; that said state is, in fact, simply lending its name to prosecute this suit for and in behalf of a few of its citizens, who reside in a small integral portion of its territory, and that the state as a whole, in its corporate or sovereign capacity, has no direct interest herein.

Second.

The facts averred are not such as to entitle the complainant to the relief sought, it not appearing that the alleged injury is irreparable, and that a full, adequate and complete remedy does not exist at law.

BRIEF AND ARGUMENT.

For convenience in discussion, the points raised by the demurrer may be summarized as follows:

1. This is not a controversy arising directly between the State of Georgia and the defendants, but is one in which the State has, at most, only a remote and contingent interest.
2. The bill on its face shows that this is really a suit for and in behalf of a few citizens of Georgia, and that the State as a whole has no direct interest in it.
3. The facts averred do not warrant the relief sought.

First.

We think it plain that the facts set out in the bill show that the State of Georgia has no such direct interest as is necessary to maintain a bill of this kind. On the other hand, they show that the injury, if any, to said State is not direct, but, at most, is remote, incidental and contingent.

The complainant's first insistence is that because the property of a few of its citizens is being injured the taxes coming therefrom are lessened, and that this gives the State a right of action against the parties causing the injury.

The power of taxation, while an essential and inherent attribute of sovereignty, is not, however, a property

right. Nor is it a right which permanently attaches itself to or becomes a part of any given property that may at any time be within the jurisdiction of the state. Strictly speaking, it is not a right at all, but a power inherent in sovereignty to require each citizen to contribute his proportionate share of money for public needs. It takes no heed of particular property, but levies against the citizen in proportion to the amount and value of such property as he may have at the time fixed by law for making assessments. Prior to this time the property of the citizen may have been injured in value fifty per cent. by the wrongful act of another; or part of it, even to the value of hundreds of thousands of dollars, may have been removed from the state, or stolen, or entirely destroyed. The taxing power of the state is in no way concerned with such matters. The state has no such direct interest as gives it the right to complain. In other words, the taxing power gives the state no such direct interest in the property within its borders as amounts to a fixed property right, such as would entitle it to maintain an action for injury to it. Its right is simply a contingent one to tax such property as the citizen may have. It does not attach itself to property in such way that the state can claim such vested interest in that particular property as gives it the right to sue for injury to it. The injury to the citizen is direct and proximate; that to the state, *remote, incidental and contingent.*

Moreover, the alleged injury to the state is *speculative.* It is a mistake to assume that because property is injured the state is also injured by its income being thereby diminished. The owner, if he so wills, can recover full compensation. Whatever this may be, much or little, it is

subject to taxation in the hands of the owner just the same as the injured value for which it stands.

We conceive that no such parental relation exists between the state and its individual citizens as that the property which belongs to the latter also belongs to that state; and that injury to it also amounts to such direct injury to the state as gives it a right of action against the wrong-doer. If so, then in every case of threatened injury to the property of a citizen, tending to lessen its taxable value, the state would have the right to intervene, making the case of the citizen its case, and redressing his wrong while redressing its own.

Next, as to the public roads. While it will be seen from the facts stated in the bill that the alleged injury to these must, in the nature of things, be almost wholly intangible, still, the state has no direct property right in such roads as these.

The state has no title or ownership in the soil over which they pass. The public, presumably, has an easement; but the Court will judicially know from the laws of Georgia that this easement is made and kept available for public use, not directly by the State of Georgia, but by the counties in which the roads lie; or, more accurately speaking, by the people of the districts through which they run. They are laid out and and kept up by assessments of labor and taxes in each district separately, and belong to the class known as county roads. It is true that the state exercises jurisdiction over them in the way of directing how they shall be laid out and maintained, but the state as a whole has no direct property interest in the roads of any given locality. In fact, it is not averred in the bill that the state as such is ag-

grieved by reason of the alleged injury to the roads, but that they are made undesirable and unsatisfactory for the use of the people of that 'locality.'

Original Bill, paragraph 11.

That a state cannot prosecute an original action in this Court on the ground of any remote or contingent interest was held in Pennsylvania vs. Wheeler Bridge Co., 13 Howard, 557. The Court said:

> "In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them or in their behalf, except in a few specified cases; nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained."

Other cases hereinafter cited also show the character and extent of the interest necessary to enable a state to maintain an original suit in this Court.

Second.

We also think it plain from the facts set out in the bill that this suit is really brought by the state to redress the grievances of a few of its citizens, and that it is not a controversy arising directly between said state and the defendants; that it is really a controversy between a

few citizens of said state and the defendants, in which the state has only a remote or contingent interest.

We think it clear, both in principle and on authority, that the State has no right to make the case of a few of its citizens its case. An original suit of this kind cannot be maintained, unless it be shown that the State in its corporate capacity, or the entire people of the State, are being injured.

In Louisiana vs. Texas, 176 U. S., p. 22, this Court said:

> "The word 'controversies' in the clauses extending the judicial powers of the United States to 'controversies betwen two or more states' and to 'controversies between a state and citizens of another state,' and the word 'party' in the clause declaring that this court shall have original jurisdiction of all cases in which a 'state shall be a party,' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the state which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another state. The citizens of the plaintiff state may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another state, but their state cannot, even with their own consent, make their case its case and compel the offending state and its authorities to appear as defendants in an action brought in this Court. If this be not so, we were wrong in New Hamp-

shire vs. Louisiana, 108 U. S., page 76, in which case it was held that one state could not, by taking charge of the demands or debts held by her citizens against another state, acquire the right to bring a suit in its name in this court against the debtor state."

In the opinion of Mr. Justice Brown in the above case it is said:

> "I am not prepared to say that if the State of Texas had placed an embargo upon the entire commerce between Louisiana and Texas, the State of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill."

In the case of New Hampshire vs. Louisiana, 108 U. S., p. 76, this court said:

> " * * * * * Indeed Sir Robert Phillmore says, in his Commentaries on International Law, Vol. II, 2nd Ed., page 12: 'As a general rule the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the state.' Whether this be in all respects true or not, it is clear that no nation ought to interfere, except under very extraordinary circumstances if the citizens can themselves employ the identical and only remedy open to the government if it takes on itself the burden of prosecution."

The citizens of Georgia not only have a full, adequate and complete remedy for compensation for the alleged injuries, but they can appeal to the courts of Tennessee

and of the United States for the identical relief now being sought for them by the State of Georgia in this suit.

That the entire citizenship, or the State in its corporate capacity, must be affected is further shown in the case of Missouri vs. Illinois, 108 U. S., p. 208, in which this Court said:

> "The health and comfort of the large communities inhabiting those parts of the state situated along the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state Moreover, substantial impairment of health and prosperity of the towns and cities of the state situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire state."

The same view is taken in Story's Constitution, Vol. II, Sec. 1638, where it is stated:

> "8. To controversies between a state and citizens of another state; because in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute their demands in a national court than in a court of the state to which those citizens belong."

The case of Missouri vs. Illinois, *supra*, is clearly distinguishable upon sound principle from the case at bar.

There the injury was being done, or was about to be done, by a state, against which the people of Missouri

had no adequate remedy, except by suit of their state in this Court.

Here the alleged injury is being done by private concerns against whom the injured citizens of Georgia have a full and complete remedy at law and in equity.

There the injury complained of affected the people of the entire state.

Here it is shown that at best only a few of the citizens of Georgia are being injured.

The case of Kansas vs. Colorado, 185 U. S., 125, is distinguishable upon practically the same grounds. It was also a suit brought against a state, and its object was to enjoin the diversion of the waters of a stream in which the State of Kansas, in its corporate capacity, had a direct interest. Again, it was not for mere injury to the stream, but for its practical destruction. Moreover, the people of Kansas had an equal right with the people of Colorado to the use of the stream in its natural flowage, and they could not equitably be deprived of it in order to confer it in its entirety upon the people of Colorado, who had no higher or better title than their own.

It is plain that the controlling principle in the above-cited cases, so far as the question of jurisdiction is concerned, is that all the people of the plaintiff states were affected and had a direct, tangible interest in the subject matter of the suits. No such state of facts is shown in the present bill. Only the few people of Georgia claiming to be injured have any direct interest in this suit. The great body of the people of the state have no interest, unless it be a remote, incidental, or contingent one.

The only sound basis upon which such jurisdiction can rest is that the entire people, or the state in its corpo-

rate capacity, must be directly interested. If it be sound in principle that a state may maintain a suit like this for alleged diminution of its revenues, because of injury to the property of citizens living in a designated integral part of its territory, then upon the same ground it could maintain such a suit for injury to the property of a few, or even one of its citizens.

Third.

The facts averred, we respectfully submit, do not warrant the relief sought.

It has already been seen that those citizens of Georgia who claim to be injured by the operations of the defendants have an adequate remedy at law for compensation, and they may also avail themselves of the same remedy in equity that is now being pursued by the State. For this reason we submit that the plaintiff, in the capacity of a representative or trustee, has no right to maintain this suit for them. And, yet, a cursory reading of the bill shows that it is the injury to the property of these citizens that furnishes the real basis of this suit. It is clear that there is no substantial injury to the State itself. The alleged injuries to its income and highways are remote, fanciful and speculative. We have no means of knowing but that they are more than met by the incidental benefits being derived by these same citizens from the operations of the defendants.

It is true that in the case of W. M. Madison, et al. vs. Tennessee Copper Co., et al., 113 Tenn., 338, the Supreme Court of Tennessee held that the operations of the defendants constituted an actionable nuisance, but it was also held that the parties had an adequate remedy

at law, and that the nuisance was not such an one as equity would enjoin.

We respectfully urge that the demurrer is well-taken and that this suit should be dismissed.

Respectfully submitted,

JAMES G. PARKS,
Attorney for D. S., C. & I. Co.